

**UNITED STATES GOVERNMENT  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 29**

**30 MAIN CONSTRUCTION CO., INC.**

**Employer**

**and**

**Case No. 29-RC-10321**

**MASON TENDERS DISTRICT COUNCIL  
OF GREATER NEW YORK**

**Petitioner**

**DECISION AND DIRECTION OF ELECTION**

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, herein called the Act, as amended, a hearing was held before Amy Gladstone, a Hearing Officer of the National Labor Relations Board, herein called the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding, the undersigned finds:

1. The Hearing Officer's rulings made at the hearing are free from prejudicial error and hereby are affirmed.
2. The parties stipulated that 30 Main Construction Co., Inc., herein called the Employer, a domestic corporation with its principal office and place of business located at 45 Main Street, Brooklyn, New York 11201, herein called the Main Street facility, has been engaged in the construction industry as a general contractor, providing construction services at various sites, including 125 Court Street, Brooklyn, New York, herein called the Court Street facility or the Court Street construction project. During the

past year, which period is representative of its annual operations generally, the Employer, in the course and conduct of its business operations, purchased and received at its Main Street facility, goods, products and materials valued in excess of \$50,000 directly from points outside the State of New York.

Based on the stipulation of the parties and the record as a whole, I find that the Employer is engaged in commerce within the meaning of the Act, and that it will effectuate the purposes of the Act to assert jurisdiction herein.

3. The labor organization involved herein claims to represent certain employees of the Employer.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Sections 2(6) and (7) of the Act.

5. Mason Tenders District Council of Greater New York, herein called the Petitioner or the Union, seeks to represent a unit of all full-time and regular part-time general conditions laborers, but excluding all other employees, clerical employees, guards and supervisors as defined in Section 2(11) of the Act.

### **Positions of the Parties**

The Employer argues that the petition should be dismissed, inasmuch as it is planning to shut down its business operations in the near future. The Union takes the opposite position. Further, the Union is not willing to proceed in an alternative unit, if the petitioned-for unit is deemed inappropriate by the Board.

The parties stipulated that if an election is directed, the voting eligibility formula set forth in *Daniel Construction Co.*, 133 NLRB 264 (1961), *as modified*, 167

NLRB 1078 (1967), and *Steiney and Company, Inc.*, 308 NLRB 1323 (1992), should be used. In *Daniel*, the Board held that in the construction industry, “in addition to those employees in the unit who were employed during the payroll period immediately preceding the date of the issuance of the [direction of election], all employees in the unit who have been employed for a total of 30 days or more within the period of 12 months, or who have had some employment in that period and who have been employed 45 days or more within the 24 months immediately preceding the eligibility date for the election...and who have not been terminated for cause or quit voluntarily prior to the completion of the last job for which they were employed, shall be eligible to vote.” *Daniel*, 167 NLRB at 1081.

### **Witnesses**

The Employer’s witnesses were Jed Walentas and Charles Frattini, the Employer’s vice president and project manager, respectively. The Union did not call witnesses.

## **FACTS**

### **Overall Operations and Related Companies**

The record reflects that the Employer has been a general contractor in the construction industry for approximately five years. The Employer’s Vice President, Jed Walentas, admitted under cross-examination that the Employer obtains all of its work through various entities controlled by his father, David Walentas, a real estate developer who “has ownership interest in properties and ...partnerships that own properties.” Accordingly, it is not necessary for the Employer to bid on projects, advertise, or solicit for work.

The work currently being performed by the Employer, as the general contractor for the Court Street construction project was awarded to the Employer by Two Trees Management Company, an entity controlled by David Walentas. Two Trees Management Company shares an office suite at the Main Street facility with the Employer and One Main Construction Corp., another general contractor of which Jed Walentas is the vice president. One Main Construction Corp., like the Employer, performs general contracting work for Two Trees Management Company. Currently, One Main Construction Corp. is the general contractor for an ongoing construction project at 70 Washington Street.<sup>1</sup> The laborers employed at 70 Washington Street include 10 to 15 permanent employees, who also perform work converting industrial buildings to apartments and “do general work around other Two Trees-related assets.”

Jed Walentas testified that in addition to serving as the vice president of the Employer and One Main Construction Corp., he does “developing work” for Two Trees Management. This work includes resolving labor issues and obtaining the necessary approvals and financing for construction projects.

#### **Court Street Facility, Sweeney Building, and Other Commercial and Residential Projects**

The Court Street construction project in downtown Brooklyn, for which the Employer is currently the general contractor, totals about half a million gross square feet and consists of a four-story underground garage, a 40,000-foot YMCA with a pool and gym, ground floor retail storefronts, and about 321 apartment units. The project has a “hard cost budget” of about 70 million dollars. According to Walentas, the Court Street project is scheduled to be completed in mid-April, 2005.

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<sup>1</sup> The record does not indicate where 70 Washington Street is located.

Previously, the Employer was the general contractor for the Sweeney building, which was of about the same magnitude as the Court Street facility. The location of the Sweeney building was not disclosed.

In addition, Frattini testified that between the completion of the Sweeney building and the commencement of the Court Street project, he performed work for the Employer on an unspecified number of smaller residential and commercial projects. However, the Employer's laborers did not perform work on these smaller projects. The record does not disclose whether laborers employed by other companies controlled by the Walentas family, such as One Main Construction Corp., worked on these projects.

#### **The Employment of Laborers in the Petitioned-For Unit**

The Employer's laborers are employed on a project-by-project basis. For example, after the need for laborers at the Sweeney building ended in February or March, 2003, the Employer did not employ any laborers until work began on the Court Street project. According to the Employer's project schedule, work on the Court Street project began in June, 2003. The excavation work began in September, 2003.

With regard to the Court Street facility, Walentas testified that by April 15, 2005, there will be no further work for laborers, barring unforeseen circumstances. Currently, there are about 25 laborers employed there. When the project was at its peak, it employed over 50 laborers. The first wave of layoffs occurred in late January, 2005.

However, Walenta conceded that there is nothing barring the Employer from hiring back the laid-off employees on a future project. Frattini, who hires, fires and directs the laborers<sup>2</sup> on the Court Street project, indicated that they are generally good

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<sup>2</sup> On the basis of this evidence, I find that Frattini is a supervisor as defined in Section 2(11) of the Act.

workers. Given the opportunity, Frattini would ask some of them to return to work for the Employer on any future projects.

### **Prospects for Future Work**

Jed Walentas admitted, under cross-examination, that his father owns a number of properties, which he is in a position to develop. In addition, the City of New York recently awarded Two Trees Management Company a contract to purchase the New York City Board of Education's former headquarters, at 110 Livingston Street in downtown Brooklyn. According to Walentas, either Two Trees Management Company, or a "Two Trees-related entity," has "an option to either close on the project in June [2005] or to forfeit its deposit and pursue other opportunities." Walentas conceded that "it is possible" that the Employer will be the general contractor at 110 Livingston Street. At a recent meeting, he told officials of the Petitioner that Two Trees Management Company, or a related entity, may hire unionized labor for "future projects including 110 Livingston Street should it happen."

Walentas conceded that he will not have to search for a job after the Court Street project is completed. Frattini has not been given a layoff notice. The Employer has no plans to vacate its office space, and will not be discharging all of its employees.

### **DISCUSSION**

In arguing that the instant petition should be dismissed, the Employer relies on *Davey McKee Corporation*, 308 NLRB 839 (1992). In that case, the Board held that no purpose would be served by directing an election, in light of the imminent termination of the employer's operations. *Davey McKee*, 308 NLRB at 840. The employer was engaged in two construction projects, which were scheduled to be completed 29 days

after the hearing closed. *Davey McKee*, 308 NLRB at 839-840. The employer had no other ongoing construction projects within the geographical scope of the unit, and had no outstanding bids. *Davey McKee*, 308 NLRB at 840.

The Board distinguished *Davey McKee* in *Fish Engineering & Construction Partners, Ltd.*, 308 NLRB 836 (1992). In *Fish*, as in *Davey McKee*, the Employer was engaged in two construction projects, which were scheduled to be completed within two months after the hearing closed. *Fish*, 308 NLRB at 836-37. However, the employer had worked on several recent projects in the same geographical area, and had bid on future work with its current contractor. *Fish*, 308 NLRB at 836. Accordingly, even though no future work had been awarded as yet, the Board declined to find that the cessation of the employer's operations was imminent, holding instead that it would serve a useful purpose to conduct an immediate election after resolving the remaining unit issues. *Fish*, 308 NLRB at 836.

The Board has explicitly recognized that in the construction industry, “many employees experience intermittent employment, and may work for short periods of time on different projects. Furthermore, they may be employed by several different employers during the course of a year.” *Daniel*, 133 NLRB at 267. The *Daniel* formula, which the parties in the instant case have agreed to apply in the event that an election is directed, was promulgated for the purpose of “enfranchise[ing] employees who, although working on an intermittent basis, have sufficient interest in the employers’ terms and conditions of employment to warrant being eligible to vote and included in the unit.” *Steiny*, 308 NLRB at 1328. Accordingly, the *Daniel* formula does not require recurrent periods of employment for the same employer, nor does it “distinguish between employers who hire

project-by-project, and those who have a so-called stable or core group of employees.”  
*Steiny*, 308 NLRB at 1327.

In the instant case, the Employer has failed to establish that the cessation of its operations is imminent. Rather, because of the Employer’s relationship with Two Trees Management Company and other entities controlled by David Walentas, the Employer has a reasonable expectation of continuing to be awarded work by these entities. Moreover, the *Daniel* eligibility formula, which the parties agreed to apply in the instant case, was specifically tailored to enfranchise employees in the construction industry who, like the Employer’s laborers, work on a project-by-project basis. *Daniel*, 133 NLRB at 267; *Steiny*, 308 NLRB at 1327. The record indicates that some of the Employer’s laborers, who performed good work on the Court Street project, may be hired back. Accordingly, I conclude that it would serve a useful purpose to conduct an immediate election in the instant case. *Fish*, 308 NLRB at 836. I find that the following employees constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(a)(1) of the Act:

All full-time and regular part-time general conditions laborers, but excluding all other employees, clerical employees, guards and supervisors as defined in Section 2(11) of the Act.

### **DIRECTION OF ELECTION**

An election by secret ballot shall be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently subject to the Board's Rules and Regulations. Eligible to vote are employees in the unit who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work



during that period because they were ill, on vacation or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced, are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Those in the military services of the United States who are employed in the unit may vote if they appear in person or at the polls.

Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced.

Also eligible to vote, pursuant to the stipulation of the parties, are all unit employees who have been employed for a total of 30 working days or more within the 12 months immediately preceding the eligibility date, or who have had some employment during that period and who have been employed 45 days or more within the 24 months immediately preceding the election eligibility date, and who have not been terminated for cause or quit voluntarily prior to the completion of the last job for which they were employed.

Those eligible to vote shall vote whether or not they desire to be represented for collective bargaining purposes by Mason Tenders District Council of Greater New York.

### **LIST OF VOTERS**

In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of the statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *N.L.R.B. v. Wyman-Gordon Company*, 394 U.S. 759 (1969). Accordingly, it is hereby directed that within 7 days of the date of this Decision, four (4) copies of an election eligibility list, containing the full names and addresses of all the eligible voters, shall be filed by the Employer with the undersigned who shall make the list available to all parties to the election. *North Macon Health Care Facility*, 315 NLRB No. 50 (1994). In order to be timely filed, such list must be received in the Regional Office, One MetroTech Center North-10th Floor, Brooklyn, New York 11201 on or before **February 18, 2005**. No extension of time to file the list may be granted, nor shall the filing of a request for review operate to stay the filing of such list except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

### **NOTICES OF ELECTION**

Please be advised that the Board has adopted a rule requiring that election notices be posted by the Employer at least three working days prior to an election. If the Employer has not received the notice of election at least five working days prior to the election date, please contact the Board Agent assigned to the case or the election clerk.

A party shall be estopped from objecting to the non-posting of notices if it is responsible for the non-posting. An Employer shall be deemed to have received copies of the election notices unless it notifies the Regional office at least five working days

prior to 12:01 a.m. of the day of the election that it has not received the notices. *Club Demonstration Services*, 317 NLRB No. 52 (1995). Failure of the Employer to comply with these posting rules shall be grounds for setting aside the election whenever proper objections are filed.

#### **RIGHT TO REQUEST REVIEW**

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570-0001. This request must be received by the Board in Washington by 5 p.m., EST on **February 25, 2005**. The request may be filed by electronic transmission through the Board's web site at NLRB.Gov but **not** by facsimile.

Dated: February 11, 2005, Brooklyn, New York.

ALVIN P. BLYER/S/

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Alvin P. Blyer  
Regional Director, Region 29  
National Labor Relations Board  
One MetroTech Center North, 10th Floor  
Brooklyn, New York 11201

## **APPENDIX**

The transcript is hereby amended as follows:

<b><u>Page</u></b>	<b><u>Line</u></b>	<b><u>Transcript Version</u></b>	<b><u>Corrected Version</u></b>
56	22	Fourth Street	Court Street
58	18	Courtland	Court and
97	4	Dunbar	DUMBO
97	11	layoff	laborer
105	6	being	begin